

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

RICKY R. FRANKLIN,

Plaintiff/Counter-Defendant,

v.

UPLAND SOFTWARE, INC.,

Defendant/Counter-Plaintiff.

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Civil No. A18-CV-00236-LY-AWA

JURY TRIAL REQUESTED

**UPLAND SOFTWARE, INC.'S SUR-REPLY IN OPPOSITION TO RICKY
FRANKLIN'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT**

Defendant Upland Software, Inc., offers this short sur-reply in response to Ricky Franklin's admission, for the first time, that he acquired the number in question in November 2014. Dkt. 19, at 7; Dkt. 20, at 7. This new fact is significant because, as Upland's evidence demonstrates, a user of the number-in-question opted in to receive messages *twice*: once on May 1, 2014, and again on August 8, 2015. *See* Dkt. No. 17-1, at ¶ 6; Dkt. No. 17-2. Accordingly, Mr. Franklin's November 2014 acquisition of the phone places that phone in his sole possession *before* the second opt-in in August 2015.

That is significant for both of Mr. Franklin's motions. For the Motion for Summary Judgment, the material fact whether Mr. Franklin consented to receive messages is certainly in dispute: he contends that he did not, while Upland's records demonstrate that he did. For the Motion to Dismiss Upland's Counterclaims, the concession shows that he was the sole possessor of the number during an opt-in that he now contends he never gave, which magnifies Upland's contention that misrepresentation has occurred in this case.

Dated June 29, 2018

Respectfully submitted,

CLEVELAND | TERRAZAS PLLC

4611 Bee Cave Road, Suite 306B

Austin, Texas 78746

512-787-1436

By: /s/ Matthew Murrell

Carlos Soltero

State Bar No. 00791702

csoltero@clevelandterrazas.com

Matthew Murrell

State Bar No. 24083545

mmurrell@clevelandterrazas.com

ATTORNEYS FOR DEFENDANT

UPLAND SOFTWARE, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on Plaintiff, who is proceeding *pro se*, by way of:

☒ United States Postal Service Mail

on this 29th day of June, 2018, to the following address:

Ricky R. Franklin
708 Brambling Way
Stockbridge, GA 30281
(678) 650-3733
rrfrank12@hotmail.com

/s/ Matthew Murrell
Matthew Murrell